15.3 INTELLECTUAL PROPERTY RIGHTS (IPRS)

Concept and Development of Intellectual Property Law in India

One of the important feature of the property is that the owner of the property may use his property as he wishes and that no body else can use his property without his authorisation. Of course that right of the proprietor or owner has been limited by the law. Generally, the property can be divided into following three categories:

(i) Movable property, consisting of movable things;

(ii) Immovable property, consisting of immovable things, and

(iii) Intellectual property, consisting of creation of human mind and the human intellect.

The Concept of Intellectual Property

As the term intellectual property relates to the creations of human mind and human intellect, this property is called Intellectual property. In other words, intellectual property relates to pieces of information which can be incorporated in tangible objects at the same time in an unlimited number of copies at different locations anywhere in the world. The property right does not vest in those copies but in the information reflected in those copies. Similar to property rights in movable and immovable property, intellectual property is also characterised by certain rights as well as limitations such as right to use and licence and also limited duration in the case of copy right and patents.

Kinds of Intellectual Property

Usually intellectual property is divided into two branches, namely, industrial property and copyright. The Convention establishing World Intellectual Property Organisation, 1967 provides that the intellectual property shall include rights relating to:

(i) literary, artistic and scientific works;

(ii) performances of performing artists, phonograms and broadcasts;

(iii) inventions in the field of human endeavour;

(iv) scientific discoveries;

(v) industrial designs;

(vi) trademarks, service marks, commercial names and designations;

(vii) protection against unfair competition; and

all other rights resulting from intellectual in the industrial, scientific, literary or artistic fields activities of a person. These activities may include the activities of industrial or commercial interests. They may be called inventions, creations, new products, processes of manufacture, new designs or model and a distinctive mark for goods etc.

Concept of Patent

Generally speaking, patent is a monopoly grant and it enables the inventor to control the output and within the limits set by demand, the price of the patented products. Underlying economic and commercial justification for the patent system is that it acts as a stimulus to investment in the Industrial innovation. Innovative technology leads to the maintenance of and increase in nations stock of valuable, tradeable and industrial assets.

The grant of first patent can be traced as far back as 500 B.C. It was the city dominated by gourmands, it was perhaps the first to grant what we now-a-days call patent right to promote culinary art. For it conferred exclusive rights of sale to any confectioner who first invented a delicious dish. As the practice was extended to other Greek cities and to other crafts and commodities, it acquired a name 'monopoly', a Greek Portmanteau word from mono (alone) and polein (sale).

Evidences of grant to private individuals by kings and rulers of exclusive property rights to inventors dates back to the 14th Century. But their purpose had varied throughout the history. History shows that in 15th Century Venice there had been systematic use of monopoly privileges for inventors for the encouragement of invention. Utility and novelty of the invention were the important considerations for granting a patent privilege. The inventors were also required to put his invention in commercial use within a specified period. In 16th Century the German princes awarded inventors of new arts and machines and also took into consideration the utility and novelty of inventions. Early laws in American colonies served primarily to encourage foreign manufacturers to establish new industries in the colonies by providing them protected “domestic markets.

By the late 15th Century, the English monarchy increasingly started using monopoly privilege to reward court favourites, to secure loyalty and to secure control over the industry but these privileges were not used to encourage inventions. In 1623, the English Parliament adopted a Statute of monopolies which recognised the inventors patent as a justifiable monopoly to be distinguished from other monopoly privileges.

The Statute outlawed the awarding of monopoly privileges except for first and true inventor of a new manufacture.

In England, during the 16th and 17th Century the inventors patent of monopoly had become of great national importance. From the mid-seventeenth Century through the mid-nineteenth Century, the laws recognising the patent monopoly spread throughout Europe and North America, but these privileges were not granted without the opposition. In India, the law relating to patents contained in the Patents Act, 1970, has been amended in the year 1995, 1999, 2002 and 2005 to meet India's obligations under the agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) forming part of the Agreement establishing the World Trade Organisation (WTO). The Patents Act has been amended keeping in view the development of technological capability in India, coupled with the need for integrating the intellectual property system with international practices and intellectual property regimes. The amendments have also been aimed at making the Act a modern, harmonised and user-friendly legislation to adequately national and public interests while simultaneously meeting India's international obligations.

Concept of Trade Mark

A Trade Mark distinguishes the goods of one manufacturer or trader from similar goods of others and therefore, it seeks to protect the interest of the consumer as well as the trader. A trade mark may consist of a device depicting the picture of animals, human beings etc., words, letters, numerals, signatures or any combination thereof. Since a trade mark indicates relationship in the course of trade, between trader and goods, it serves as a useful medium of advertisement for the goods and their quality. The object of trademark law is to permit an enterprise by registering its trademark to obtain an exclusive right to use, share, or assign a mark. Closely related to trademarks are service marks which distinguish the service of an enterprise from the services of other enterprise.

Trademarks are not a creation of our times, even though their current nature and omnipresence is of rather recent origin. Trademark, a word created only in the 19th century continued to play a significant role in the trade and commerce throughout the major part of history, including medieval times and the centuries beyond. The guilds, one of the mainstays of economies in earlier times, often even required their members, the masters of the various crafts, to affix marks on their products in order to exercise control over their production. The trademarks began to assume their present day role in the course of the eighteenth century with the advent of mass production and growing trade in goods with the establishment of more complicated system of distribution of goods from the producer to the buyer. In the course of time, remedies were developed by the Courts, or the legislations to stop the infringement of trademark rights. One of the first countries to enact a comprehensive law on trademarks, was France in 1857, a law which remained in force for more than 100 years. United Kingdom enacted its Trademarks Registration Act, 1875 providing for the registration of trademarks. Subsequently, various amendments

were introduced in the Act of 1857 and finally the Trade Marks Act, 1938 was enacted. As far as the recognition of modern ways of exploiting trademark is concerned, the Trade Marks Act, 1938, since its inception, recognised the assignment of trademarks without the simultaneous transfer of the respective business. The national developments were influenced to a substantial degree by developments in international field, particularly Paris Convention for the Protection of Industrial Property, 1883, including trademarks which is supplement by the Madrid Agreement on Registration of trademarks; signed in 1891. In India, the relating to Trademarks is contained in the Trade and Merchandise Marks Act, 1958, which has now been replaced by the Trade Mark Act, 1999.

In view of developments in trading and commercial practices, increasing globalisation of trade and industry, the need to encourage investment flows and transfer of technology, need for simplification and harmonization of trade mark management systems and to give effect to important judicial decisions, a new Trade Marks Act, 1999 have been enacted to provide for registration of trade mark for goods as well as services including prohibition to the registration of imitation of well known trade marks, and expansion of grounds for refusal of registration. The Act also simplified the procedure for registration of registered user, enlarged the scope of permitted use and allowed the registration of Collective Marks owned by associations, etc.

The Act also provides for establishment of an Appellate Board for speedy disposal of appeals and rectification applications. The Act empowers the Registrar to register certification trade marks. So far this power was vested with the Central Government. Provision for enhanced punishment for the offences relating to trade marks on the lines of Copyright Act, 1957; restriction on sale of spurious goods; and use of some one else trade marks as part of corporate names, or name of business concern have also been made in the Act. The new Act amended the definition of trade marks, provides for filing a single application for registration in more than one class and extension of period of registration and renewal from 7 to 10 years. Making trade mark offences cognizable; enlarging the jurisdiction of courts on the lines of Copyright Act; and amplifying the powers of the court to grant ex parte injunction in certain cases, are other notable features of the new Act.

Concept of Copyright

The idea of Copyright protection only began to emerge with the invention of printing, which made it for literary works to be duplicated by mechanical processes instead of copied by hand. This led to the grant to privileges, by authorities and kings, entitling beneficiaries exclusive rights of reproduction and distribution, for limited period, with remedies in the form of fines, seizure, confiscation of infringing copies and possibly damages.

However, the criticism of the system of privileges led to the adoption of the Statute of Anne in 1709, the first copyright Statute. In the 18th century there was dispute over the relationship between copyright subsisting in common law and copyright under the Statute of Anne. This was finally settled by House of Lords in 1774 which ruled that at common law the author had the sole right of printing and publishing his book, but that once a book was published the rights in it were exclusively regulated by the Statute. This common law right in unpublished works lasted until the Copyright Act, 1911, which abolished the Statute of Anne.

Copyright is a well recognised form of property right which had its roots in the common law system and subsequently came to be governed by the national laws in each country. Copyright as the name arose as an exclusive right of the author to copy the literature produced by him and stop others from doing so. There are well-known instances of legal intervention to punish a person for copying literary or aesthetic out put of another even before the concept of copyright took shape. The concept of idea was originally concerned with the field of literature and arts. In view of technological advancements in recent times, copyright protection has been expanded considerably. Today, copyright law has extended protection not only to literary, dramatic, musical and artistic works but also sound recordings, films, broadcasts, cable programmes and typographical arrangements of publications. Computer programs have also been brought within the purview of copyright law.

Thus, the copyright deals with the rights of intellectual creators in their creation. The copyright law deals with the particular forms of creativity, concerned primarily with mass communication. It is also concerned with virtually all forms and methods of public communication, not only printed publications but also with such matters as sound, and television broadcasting, films for public exhibition etc. and even computerised systems for the storage and retrieval of information. The copyright law, however, protects only the form of expression of ideas themselves. The creativity protected by copyright law is creativity in the choice and arrangement of words, musical notes, colours, shapes and so on. In India, the law relating to copyright is governed by the Copyright Act, 1957 which has been amended in 1983, 1984, 1985, 1991, 1992, 1994, 1999 and 2012. The amendment introduced in 1984 included computer program within the definition of literary work and a new definition of computer program was inserted by the 1994 amendment. The philosophical justification for including computer programs under literary work has been that computer programs are also products of intellectual skill like any other literary work.

In 1999, the Copyright Act, 1957 has been amended to give effect to the provisions of Article 14 of the TRIPs agreement providing term of protection to performers rights at least until the end of a period of fifty years computed from the end of the calendar year in which the performance took place. The Amendment Act also inserted new Section 40A empowering the Central Government to extend the provisions of the Copyright Act to broadcasts and performances made in other countries subject to the condition however that such countries extend similar protection to broadcasts and performances made in India. Another new Section 42A empowers the Central Government to restrict rights of foreign broadcasting organisations and performers.

Emerging Issues

While the IPR system in India comprises of strong Intellectual Property laws but it has many loopholes as it lacks effective implementation, for which "least priority given to adjudication of IP matters" is often quoted as a reason. Major challenge is to inform the enforcement officials and the Judiciary to take up issues of Intellectual Property rights, at par with other economic offences, by bringing them under their policy locator. There are also many issues in having an Intellectual Property fund, which can be utilized for further developing the IP culture in the country. It is necessary to devise a National IP Policy for India, which will help in working towards realizing the vision of India in the area of Intellectual Property rights. This will enable the establishment of a strong socio-economic foundation and deep international trust.

In recent years, the issue of intellectual property rights protections is debatable among public policy approaches to issues in developing countries. The TRIPs agreement, implemented in 1993 among World Trade Organization member nations, sets minimum standards of intellectual property rights protections and enforcement in many developing countries, with the threat of negative repercussions if these guidelines are not followed.

Since many decades, intellectual property law has developed legal rules that cautiously balance the above competing interests. The objective is to provide enough legal protection to maximize incentives to engage in creative and innovative activities while also providing rules and policies that minimize the effect on the commercial marketplace and minimize interference with the free flow of ideas generally. In short, the law has developed a careful balance between competing interests. It is observed that legislative enactments and judicial decisions have adopted an extensive view of intellectual property. The subject matter eligible for protection has continued to expand significantly in recent years. This expansion has removed the clear description between patent, copyright, and trademark law. It has also led to overprotection of intellectual property in the form of overlaps that allow multiple bodies of intellectual property law to concurrently protect the same subject matter. Such overlapping protection is difficult because it interferes with the carefully developed principles that have evolved over time to balance the private property rights in intellectual creations against public access to such creations.

Plagiarism is a major issue. It is the act of theft of another person's intellectual property which comprises of ideas, inventions, and original works of authorship, words, slogans, designs, proprietary information, and using them as own without giving credit to main author or inventor.

Today, digital technologies are major tools for creating and storing information for its speed and easy access. Intellectual property rights apply on the Internet but the main issue is to make them enforceable. The ease of reproducing works if they are in digital format is low-cost and there is a near-perfect quality of copies. Publishers argue that the Internet harms their intellectual property interests by fundamentally transforming the nature and means of publications and thus making their works extremely vulnerable to Internet piracy. The distributed nature of Internet's management makes it possible for any user to widely circulate a work on the electronic network termed as Cyberspace through any number of channels. A user can easily distribute a work to news groups through e-mail or on personal website. Intellectual Property Rights Law has presented problems for advanced technologies such as computer programmers. The law adopts that something is either in writing protectable through copyright or a machine protectable by a patent but not by both concurrently.

In Indian situation, Indian Copyright Act kept track of international conventions, the current copyright law has many deficits as compared to the west. As India did not sign the "WIPO Internet Treaties" there is no corresponding legislation in India to the US DMCA. The present Copyright Act of India does not have requirements regarding the 'technological protection measures' nor the protection of electronic rights management information. Some provisions of the Indian Penal Code, 1860 (IPC) may serve to provide for legal protection for technological measures. Section 23 of the IPC speaks of 'wrongful gain or wrongful loss'.